

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
 )  
Protecting the Privacy of Customers of Broadband ) WC Docket No. 16-106  
and Other Telecommunications Services )  
 )

To: The Commission

**ORACLE REPLY TO OPPOSITIONS  
TO PETITIONS FOR RECONSIDERATION**

Oracle<sup>1</sup> hereby replies to the oppositions and comments filed pursuant to the Federal Communications Commission’s (“Commission’s” or “FCC’s”) January 17, 2017 *Public Notice* seeking comment on petitions for reconsideration in the above-referenced proceeding.<sup>2</sup> Oracle approaches these questions from the perspective of a technology supplier to both the telecommunications industry and the Internet industry, as our technology is widely deployed in each. We are also new to these questions at the FCC so we approach these topics with somewhat of a fresh eye.

The petitions filed by Oracle and other stakeholders (“Petitions”) overwhelmingly demonstrate that certain rules adopted in the Report and Order (“*Order*”)<sup>3</sup> were based on a

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<sup>1</sup> Oracle offers an integrated array of applications, databases, servers, storage, and cloud technologies to empower modern business. Oracle provides a wide choice of software, systems, and cloud deployment models – including public, on-premises, and hybrid clouds – to ensure that technology flexes to the unique needs of a business. More than 420,000 customers across 145 countries have harnessed Oracle technology to accelerate their digital transformation.

<sup>2</sup> *Petitions for Reconsideration of Action in Rulemaking Proceeding*, Public Notice, WC Docket 16-106, Report No. 3067 (rel. Jan. 17, 2017); Oracle Petition for Reconsideration, WC Docket No. 16-106 (filed Dec. 21, 2016) (“Oracle Petition”).

<sup>3</sup> *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd 13911 (2016) (“*Order*”).

flawed factual foundation and have tilted the playing field in ways that will harm both competition and consumers. The Commission now has the opportunity to ensure a consistent and fair approach to online privacy and to the digital advertising market, which in turn will promote innovation and investment, better products and services, lower prices, more job creation, and faster economic growth.<sup>4</sup> The Commission therefore should grant the Petitions to reconsider the *Order* so that – at minimum – broadband Internet access service (“BIAS”) providers are subject to the same privacy framework that the Federal Trade Commission (“FTC”) applies to “edge providers.”

## **I. THE RECORD ON RECONSIDERATION FURTHER UNDERLINES THE FLAWED PREMISES OF THE ORIGINAL FCC *ORDER***

The prior Commission decided to treat BIAS providers differently from other players within the Internet ecosystem based on the mistaken premise that BIAS providers act as gatekeepers between consumers and the Internet and thus have a uniquely comprehensive view of consumers’ online activities.<sup>5</sup> From a technology perspective, distinctions drawn between BIAS providers and so-called “edge providers” do not actually hold water. This distinction seems to be a regulatory invention of the Commission based on its perspective of the marketplace. The caricature of BIAS providers as powerful operators of the most significant

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All references to “Petitions” in this reply are to petitions for reconsideration filed in WC Docket 16-106 on or about January 3, 2017; references to “Oppositions” or “Comments” are to oppositions or comments filed in WC Docket 16-106 on or about March 6, 2017.

<sup>4</sup> See Letter from Kenneth Glueck, Senior Vice President, Office of CEO, Oracle Corporation, to Ajit Pai, Chairman, Federal Communications Commission (March 13, 2017) (“Oracle Letter”), *attached to* Letter from Kenneth Glueck, Senior Vice President, Office of CEO, Oracle Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28; WC Docket No. 16-106; MB Docket No. 16-42; CS Docket No. 97-80 (March 13, 2017); Kenneth Glueck, *FCC Chairman Pai: Calling It Like It Is*, The Hill (Feb. 28, 2017), <http://thehill.com/blogs/congress-blog/politics/321591-fcc-chairman-pai-calling-it-like-it-is>.

<sup>5</sup> See Oracle Petition at 3.

gateway of personal data<sup>6</sup> simply does not reflect the realities of the online ecosystem.

Companies that provide content, services, and advertising online can not only track consumers across the Internet, across apps and devices, and in some cases through physical space – and thus have access and visibility to a treasure trove of consumer data – but they also can decide who may obtain access to this data.<sup>7</sup> Some of these companies can even exercise control over BIAS providers’ access to this data when BIAS providers provide mobile apps and other services to add extra value to their customers.<sup>8</sup>

Thus, BIAS providers are not the true gatekeepers of consumer information as the *Order* posits; instead, as the Petitions identify, the FCC ignored record evidence that so-called “edge providers” enjoy the privileged position of having comprehensive access to, and control over, much of the information generated by consumers browsing the Internet and using mobile applications.<sup>9</sup> Worse, a critical flaw of the *Order* relates to how it treats some members of the ecosystem differently based on the strict definition of BIAS providers, despite the fact that some of the so-called “edge providers” perform essentially the same service as a BIAS provider – i.e., provide consumers the tools they need to access content and services on the Internet. Moreover, mobile devices now make up more than 70 percent of global compute, and these devices collect

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<sup>6</sup> See *Order* ¶ 30 (“BIAS providers’ gatekeeper position allows them to see every packet that a consumer sends and receives over the Internet while on the network, including, absent encryption, its contents” whereas “[b]y contrast, edge providers only see a slice of any given consumers Internet traffic.”).

<sup>7</sup> See Oracle Petition at 4-5.

<sup>8</sup> Despite providing the device’s connectivity, a BIAS provider that provides an app can only collect the same consumer information that is available to app providers, mobile advertisers, and other edge providers (and of course, the operating system providers themselves) as allowed by the terms and permissions of the operating system and mobile app store.

<sup>9</sup> Oracle Petition at 3-7; Wireless Internet Service Providers Associations (“WISPA”) Petition at 17-18; NCTA-The Internet & Television Association Petition at 2; Competitive Carriers Association Petition at 9 (citing the Oracle Petition); see also Comments of Tech Knowledge at 3 (observing that “Google sees more consumer information on the web than any ISP”); Comments of the Technology Policy Institute at 6-7 (noting that the growing popularity of encryption limits the ability of ISPs to “access to the content of users’ activities”).

far more consumer information than can even a mobile BIAS provider. Yet the prior Commission was perfectly comfortable creating regulatory disparities for companies and technologies offering precisely the same functional end – getting consumers content from the Internet. The record here confirms the prior FCC’s erroneous understanding of the technology. The Wireless Internet Service Providers Associations aptly observed that “edge providers ... have greater access to consumer information and exploit that as a primary revenue source,” as compared to broadband providers.<sup>10</sup> Indeed, “[t]he same data the *Order* constrains ISPs from using will continue to be routinely accessed and used by all other Internet entities operating under a different set of standards and requirements.”<sup>11</sup> The Oppositions have no meaningful answer for the Commission’s error.

In fact, comments from individuals in the docket show substantial concern about the practices of certain non-BIAS providers like Google, whether or not these same consumers also are concerned about broadband providers’ information collection and use practices.<sup>12</sup> This Commission has an opportunity to adjust its rules to reflect the marketplace reality that these consumers already appreciate – the reality that consumers concerned about their online privacy do not uniquely ascribe that concern to BIAS providers.

Reconsidering the broadband privacy rules and working with the FTC would also address another trend evident in many consumer comments in this proceeding: a lack of understanding about how the ecosystem works. In contrast to these consumers’ assumptions otherwise,<sup>13</sup> many

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<sup>10</sup> WISPA Petition at 17-18.

<sup>11</sup> NCTA-The Internet & Television Association Petition at 2.

<sup>12</sup> Indeed, in this docket, over 37,000 individual commenters mentioned Google in their comments, including those that raised concerns about Google and other online providers’ practices, as well as those that sought to distinguish Google from ISPs. Suffice to say, companies like Google are a highly relevant aspect of this privacy discussion from the perspective of consumers, a fact largely ignored by the FCC.

<sup>13</sup> See, e.g., Comment of betty goller; Comment of Martin Marguiles.

edge provider services are not free yet still result in massive tracking (e.g., the purchase of a device with Android). Non-BIAS providers actually have substantially more control of the flow of valuable consumer information online than BIAS providers, as noted above. For example, these artificial distinctions become clear when thinking about new products, like Internet-connected Android TV, which collects substantial amounts of personally identifiable consumer information – potentially much more than what would be available to BIAS providers. Good policy should not regulate technologies based on what device and stream is connected to the HDMI. Even free services that offer the ability to opt out of targeted advertising often will continue tracking even if not sending ads. The landscape itself is far too complex to create artificial regulatory distinctions that are increasingly arbitrary particularly from a consumer-perspective. By working with the FTC, the Commission can apply technology- and competitor-neutral policymaking to online behavior and ensure like behavior is treated consistently.<sup>14</sup>

## **II. BIAS PROVIDER-SPECIFIC PRIVACY RULES HARM CONSUMERS BY THWARTING COMPETITION IN THE DIGITAL ADVERTISING MARKET**

In contrast to the assumption of the prior Commission, today's Internet access market is increasingly dynamic, competitive, and complex. Other aspects of the Internet ecosystem, however, are far less competitive. In particular, one company, Google, has a dominant presence in computing and digital advertising.<sup>15</sup> The Commission should not further tilt the playing field and entrench Google in these markets by restricting strong potential entrants from the BIAS market from entering digital advertising.<sup>16</sup>

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<sup>14</sup> See Oracle Letter at 1.

<sup>15</sup> See Oracle Petition.

<sup>16</sup> See Oracle Letter at 1-2 (observing that consumers do not benefit from over-regulation of some firms and the under-regulation of others).

Rather than imposing regulatory hurdles to competition,<sup>17</sup> the Commission should be facilitating competitive entry by BIAS providers into new markets such as digital advertising. The only other possible answer would be to significantly expand the definition of BIAS providers so that all participants in this market are treated similarly – and this answer would stifle innovation and economic growth in the Internet ecosystem. As observed by the Technology Policy Institute:

Any regulation that raises the costs of advertising and contacting customers will have a disproportionately adverse effect on smaller firms and new entrants. This is especially true of internet advertising where established firms have data on their customers and visitors to their web sites, but new firms must purchase such data. As long as there is a market for customer data, entrants can begin competing relatively easily. If, however, regulation reduces the size of this market and increases costs, the effect will be to reduce competition from new entrants.<sup>18</sup>

The *Order*, if left unfixed, will ensure that BIAS providers, upstart and relatively new entrants to the online advertising market,<sup>19</sup> will be unable to compete, ultimately to the detriment of consumers who would benefit from new, vigorous competition.

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<sup>17</sup> See Joint Opposition of Consumers Union and Consumer Federation of America at 3 (explaining that should a BIAS provider seek to compete with “other companies in providing other services over the internet,” it should “establish separate, independent affiliates.”).

<sup>18</sup> Comments of the Technology Policy Institute at 12 (footnote omitted).

<sup>19</sup> In fact, the FCC’s privacy rules all but assure that small BIAS providers, who currently “do not monetize private consumer information much less compete for digital advertising dollars,” WISPA Petition at 18, never even have the option to enter the market.

### III. CONCLUSION

Consumers are clearly concerned about privacy, and companies that understand that consumer trust is fundamental for their success know that they must respect consumers' privacy. But the best approach to address these concerns is for the FCC to work with the FTC to address these complex issues in one consistent approach. Accordingly, the FCC should grant the Petitions from Oracle and ensure, at a minimum, that the privacy regime applicable to BIAS providers is entirely consistent with the FTC's framework for others within the Internet ecosystem.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Theresa Edwards, hereby certify that on this Mar. 16, 2017, a copy of the above Reply to Oppositions to Petitions for Reconsideration was served by first-class mail, postage prepaid, upon the following:

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